

Revisions to Notice of
Your Rights After Fee
Arbitration form- Request
for Release for Additional
Public Comment

DATE: February 6, 2008

TO: Members of the State Bar Board Committee on Regulation, Admissions & Discipline Oversight

FROM: Jill Sperber, Director, State Bar Office of Mandatory Fee Arbitration

SUBJECT: Proposed Revisions to the Notice of Your Rights After Fee Arbitration form- Request for Release for Additional Public Comment

Executive Summary

Business and Professions Code section 6200, *et seq.* governs the Mandatory Fee Arbitration (MFA) Program. Mandatory Fee Arbitration programs are required by statute to deliver to the parties with any fee arbitration award a notice advising them of their rights to judicial relief following the arbitration proceeding. At its July 19, 2007 meeting, the RAD Committee agreed to authorize release for public comment proposed revisions to the Notice of Your Rights After Fee Arbitration form distributed by the State Bar for all MFA programs to use.

The suggested revisions would: 1) identify on the notice form the Judicial Council forms available for post-arbitration filing in court and provide a website link to access the forms; 2) explain that as an alternative to requesting a trial de novo following non-binding arbitration; a party could petition to correct or vacate the award and request a new arbitration; 3) clarifies court procedures using more consumer friendly wording and 4) improves internal cross-references and provides a website address for the State Bar's form to request assistance to enforce the award.

The 90-day public comment period ended October 26, 2007. Four comments were received. The MFA believes that further revisions to the Notice are appropriate to improve consumer education as follows: add another warning in the beginning about the importance of deadlines, explain that a party could become a defendant in a post-arbitration lawsuit, and provide information on a non-appearing party's entitlement to a trial following non-binding arbitration. The additional proposed revisions to the Notice of Your Rights After Fee Arbitration form warrant further public comment for a 60-day period, shortened for good cause, in the form attached hereto as Attachment A.

I. BACKGROUND

The Board of Governors is charged with establishing, maintaining and administering a system and procedure for the arbitration of disputes concerning fees, costs, or both,

charged by attorneys for their professional services. (Business and Professions Code section 6200, *et seq.*) Business and Professions Code section 6204.5 requires the State Bar or the local bar association program to deliver to the parties a notice advising them of their rights to judicial relief after the arbitration proceeding. The Notice of Your Rights After Arbitration Form is provided to the local bar associations by the State Bar as the approved form to use.

Starting in Board Year 2005-2006, the Mandatory Fee Arbitration (MFA) Committee began to comprehensively study ways to enhance consumer education about the MFA program. During its review, the MFA Committee observed that the required Notice of Your Rights After Fee Arbitration form is, generally, the first time most fee arbitration parties learn about their various legal options following mandatory fee arbitration. In response to suggestions from several clients and after working with the current Notice form for a number of years, the MFA Committee concluded that the current Notice form should be improved upon to better educate clients about their post-arbitration rights, especially since many clients in fee arbitration participate in *pro per*.

Specifically, the MFA Committee proposed revisions to the Notice form to accomplish the following:

- 1) identify the various Judicial Council forms used in post-fee arbitration litigation;
- 2) describe more thoroughly the options that parties have following non-binding mandatory fee arbitration, including the right to petition to correct or vacate the award;
- 3) clarify that if a petition to vacate an award is granted, the court may order a new arbitration with the same bar program with a new arbitration panel;
- 4) explain that the court will charge a filing fee but applications for waiver of fees and costs are available; and
- 5) provide website addresses for the Judicial Council and State Bar enforcement of award forms.

At the July 17, 2007 RAD Committee meeting, these suggested revisions were released for a 90-public comment period which ended October 26, 2007.

II. PROPOSED ADDITIONAL REVISIONS TO THE NOTICE FORM FOLLOWING RETURN FROM PUBLIC COMMENT

During the public comment period, four comments were received.¹ Two of them were from two different local bar association staff members applauding the changes. The third comment was from the MFA Committee's former Chair, attorney Gerald Knapton, who suggests waiting to revise the Form until the California Supreme Court decides *Schatz v Allen Matkins*, a case concerning the enforcement of a pre-existing fee arbitration clause. Although the MFA Committee agrees that the opinion in *Schatz*

¹ These comments are not attached but will be made available at the RAD meeting upon request.

could affect the Form's section about rights following non-binding arbitration when there is a pre-existing fee arbitration clause, the MFA Committee believes that since oral argument has not been set in that case, the Form's other revisions should move forward subject to future amendments warranted by *Schatz*.

The fourth comment was from Kathie Lustig, an Oregon resident and client in a 2006 California fee arbitration. She frequently submits suggestions to the MFA Committee to improve consumer education about the Program. Her prior suggestion resulted in the proposed language about the option of correcting or vacating a non-binding award set forth in Part 1. The portions of Ms. Lustig's latest comment relevant to the Form suggest re-ordering one of the options to challenge a non-binding arbitration award, "re-working" the consumer friendly wording, and providing information on recourse following an unfair hearing or procedural errors.

At its November 30, 2007 meeting, the MFA Committee considered the comments. In response to some of the comments, the MFA Committee suggests listing the statutory grounds for vacating a binding award (Part 2 para. B) and including an early warning about the importance of deadlines placed at the beginning of the Form. At its January 25, 2007 meeting, the MFA Committee suggested two new sections. The first new section would explain that an arbitration party may become a defendant in a post-arbitration lawsuit (Part 1 para. F) and the second section would explain whether a party who failed to appear for non-binding arbitration is entitled to a trial de novo (Part 1 para. G.) The MFA Committee requests that these further proposed revisions to the Form made following return of the Form from public comment be released for additional public comment, in the form attached as Attachment A,.

III. REQUEST FOR A PUBLIC COMMENT PERIOD OF SIXTY (60) DAYS

Pursuant to the State Bar's rule regarding public comment (Title 1, rule 1.10) public comment proposals are normally circulated for ninety days, but the Board may shorten the comment period to a reasonable period that may not be fewer than thirty days.

Many proposed revisions to the Form have returned from a full 90-day public comment period. The next round of comment will focus on a few new sections proposed here. Although the Form affects all users of the MFA Program, a narrow albeit important segment of stakeholders, i.e., the local bar association programs, is the sector most likely to respond to any changes to the Form. The MFA Committee will again directly solicit the local bar programs (staff and chairpersons) for public comment. A 60-day public comment period would provide sufficient time to receive comments on the proposed revisions, review any comments at the MFA Committee's May 23, 2008 meeting, and make a final recommendation for the RAD Committee's and Board's consideration for the July 16-17, 2008 Board meeting.

For these reasons, it is recommended that the RAD Committee authorize the release of the proposed revisions to the Minimum Standards as set forth above for a shortened period of 60 days.

IV. EFFECTIVE DATE OF APPROVAL

The proposed revisions to the Model Rules of Procedure for Fee Arbitrations would become effective upon final consideration by the Board of Governors, after recommendation by the RAD Committee following the public comment period.

V. FISCAL/PERSONNEL IMPACT

None.

VI. IMPACT ON BOARD BOOK/ADMINISTRATIVE MANUAL

None.

VII. STATE BAR RULES IMPACT

None.

VIII. STRATEGIC IMPACT.

None.

IX. PROPOSED RESOLUTION

If you agree that the proposed further revisions to the Notice of Client's Right to Arbitration form set forth in Attachment A should be released for a 60- day public comment period, your adoption of the following resolutions would be appropriate:

"RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the proposed additional revisions to the Notice of Your Rights After Arbitration in the form attached hereto as Attachment A, for a public comment period of 60 days; and

FURTHER RESOLVED, that authorization by the Board Committee on Regulation, Admissions and Discipline Oversight for publication for public comment is not, and shall not be construed as a recommendation or approval by the board committee or the Board of Governors of the materials published."